No. 86-750

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SIMPSON PAPER COMPANY,
Petitioner,

v.

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
OF THE DEPARTMENT OF INDUSTRIAL RELATIONS
FOR THE STATE OF CALIFORNIA,
Respondent.

On Appeal for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Order issued by the Division of Occupational Safety and Health, which requires that an employer provide and pay for safety shoes, is preempted by federal labor law 1) where the employer's custom and practice of providing partial reimbursement for those employees who voluntarily chose to wear safety shoes occurred at a time prior to the determination that such shoes were required safety equipment and 2) where the employer never acknowledged its duty to provide and pay for such equipment at the inception of the collective bargaining process.

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OPINION BELOW, JURISDICTION, AND STATUTES INVOLVED

The Opinion below, jurisdiction of this Court and relevant constitutional and statutory provisions are set out at pages 1 to 3 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, Simpson Paper Company (hereinafter referred to as "Simpson" or "Petitioner"), requests that this Court invoke its jurisdiction to review a decision of the California Court of Appeal for the Third Appellate District which upheld the decision of the Division of Occupational Safety and Health of the State of California (hereinafter referred to as the "Division" or "Cal/OSHA"), which required that Simpson provide and pay for the cost of safety shoes for employees working at various locations

of its Shasta Mill, where the Division had determined that such safety shoes were necessary for employee protection. Simpson argues that it had a collective bargaining agreement prior to that time in which it was only required to pay a small portion of the cost of safety shoes. Thus, Simpson urges that the Division's Order abridges national labor relations law. However, as will be seen in the forthcoming discussion of the factual background of this case, the so-called collective bargaining agreement arose as a custom and practice years before when employees were not required to wear safety shoes but could, on their own volition, purchase them and receive partial reimbursement.[1] Only as a result of the Divison's Order, which was issued on September 19, 1980, were safety shoes (in contrast to other types of foot protection such as steel toe caps) declared to be required safety equipment which was to be provided and paid for by the employer. The law of California requires generally that employers both provide and pay for required safety equipment. *Bendix Forest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465, 470-472 [158 Cal.Rptr. 882, 600 P.2d 1339]. Unanswered by case authority in California is the impact of a collective bargaining agreement with regard to the employee's statutory entitlement for payment of such equipment by the employer. *Bendix, supra,* 25 Cal.3d at 72 [158 Cal.Rptr. at 886] fn. 7. However, at no time has Simpson ever acknowledged at the inception of any bargaining process that as an employer it was required to provide and pay for this equipment, and then given this acknowledgement of its statutory obligation, attempt to shift the burden to employees by provision of some other economic benefit. The Division maintains that under such circumstances the Division's Order could not possibly abridge federal labor law as it might impact the custom and practice of partial reimbursement which occurred prior to the time that either Simpson or the Division determined that safety shoes were required equipment.

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[1] In fact, none of the collective bargaining agreements prior to the issuance of the Division's Order to Take Special Action remotely addressed the subject of provision and payment for safety equipment in general or safety shoes in particular.

A.

FACTUAL BACKGROUND

Simpson took over operation of the Shasta Mill from a prior owner in 1972. At that time there existed a custom and practice in which employees who wished to purchase safety shoes were reimbursed in the amount of $2.00 per pair of shoes. This practice was continued by Simpson. At some time during 1974 the amount of reimbursement was increased to $4.00. There was no testimony that this increase occurred as the result of negotiations or that the raise in amount coincided with the renegotiation of the contract.[2] Prior to 1978, Simpson's "employees could choose to go without foot protection, to wear safety shoes, or to wear toe caps." (Brief of Simpson Paper Company, July 2, 1981, p. 9, filed with the Division.) The Court of Appeal determined that in none of the collective bargaining agreements (signed in 1974, 1976, 1977, and 1979) was there a reference to payment for safety shoes or any other safety equipment. Moreover, the Court determined that the issue was never formally discussed as a part of contract negotiations. (Decision of California Court of Appeal, at Appendix, p. A-2, of Petition.) When in November, 1978, Simpson issued an order requiring all employees in the Finishing Department to wear safety shoes, the United Paperworkers International Union, Local 1101, AFL-CIO (hereinafter referred to as the "Union") filed a grievance as a result of Simpson's refusal to pay for these safety shoes which were now mandatory.

As the result of an inspection of Simpson's Shasta Mill, the Division on September 19, 1980, issued an Order to Take Special Action, which required that employees who were engaged in eleven activities or areas be provided foot protection. This Order was contested by Simpson and in accord with then existing

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[2] These factual findings were made in a Decision by the Hearing Officer sitting on behalf of the Division at page 11. The Decision was rendered by the Hearing Officer on November 9, 1981, and was formally transmitted to the parties on January 12, 1982 by Art Carter, Chief of the Division. The Division's Decision was then appealed to the California Court of Appeal. Hereinafter the Division's administrative decision will be referred to as Decision of Hearing Officer, p. .

provisions of Labor Code 6308, a hearing was held before the Division. (Former Labor Code section 6308, Stats. 1973, Ch. 993, amended by Stats 1977, Ch. 62) In the context of this hearing, the parties stipulated that Simpson paid the entire cost of toe caps but not the entire cost for safety shoes or boots. (Decision of Hearing Officer, p. 7) Simpson argued that with reference to five of the eleven categories, workers would adequately be protected by wearing toe caps instead of safety shoes required by the Order. However, the Division hearing officer found that toe caps were not an appropriate type of permanent protection for any classification of employees in the Shasta Mill and affirmed the Division Order requiring that safety shoes or boots be provided. (Decision of Hearing Officer, pp. 12-13) Prior to the hearing officer's decision, a labor arbitrator, who was designated to hear the earlier-referenced Union grievance, determined that the contract did not require that Simpson pay the entire cost of safety shoes, but rather that the custom and practice that had been in existence since 1974 limited Simpson's obligation to partial reimbursement of $4.00 per pair of shoes. In reaching her decision that not only was Simpson required to provide safety shoes, but also pay for them, the Division hearing officer considered the labor arbitrator's decision. To the extent that the labor arbitrator determined that the contract between Simpson and the Union did not require full reimbursement for safety shoes, the Division hearing officer agreed. (Decision of Hearing Officer, p. 33) However, the Division hearing officer concluded that the contract was not binding in terms of the ability of the Division to order payment in light of the fact that the labor arbitrator's decision, which construed a custom and practice of providing partial reimbursement for safety shoes when such equipment was purchased at the volition of an employee, was not determinative of employee rights for provision and payment for such equipment by the employer when the use of such equipment became mandated by law.

B.

SUBSEQUENT EVENTS FOLLOWING THE DIVISION'S DECISION AND SUBMISSION OF THE CASE TO THE COURT OF APPEAL

In June 1982, three months before this case was first submitted to the California Court of Appeal, bargaining negotiations took place between Simpson and the Union; the employer's $4.00 reimbursement policy was continued. This practice was again renewed in 1985 with increased amounts of reimbursement. However, neither the 1982 nor 1985 bargaining sessions contained any statement or evidence that employees were waiving a legal entitlement that they had under the California Labor Code pursuant to the Division's Order to Take Special Action. There is no evidence that the Union ever intended to forfeit such an entitlement in any of these sessions. To the contrary, the record of negotiation reflects that from the moment safety shoes were first required by Simpson as a condition of employment, there existed a continuing and consistent controversy concerning whether the employer or employees bore the responsibility of payment for these required safety devices. The Declaration of Dean Childers, Personnel Manager for Simpson, (which Declaration was submitted with Simpson's Petition for Rehearing before the California Court of Appeal), does not provide any evidentiary support that an agreement existed between the Union and Simpson in which there was a waiver of employee rights under the Labor Code and the Division's Order to Take Special Action. More importantly, the Declaration of Richard James, President of the Union, (which Declaration was submitted with the Division's Opposition to Petition for Rehearing before the California Court of Appeal), makes clear that the Union did not intend to waive any rights of those employees subject to the Division's Order to Take Special Action.[3] Therefore, neither in negotiations just prior to submis-

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[3] In his declaration, Mr. James states that during the pendency of the litigation (the case was submitted to the Court in 1982 and decided in 1986), the Union sought to assure interim financial support and not to waive any legal rights for complete reimbursement pursuant to the Division's Order (Declaration of Richard James, pp. 1-2.)

sion of the case to the Court of Appeal nor in subsequent negotiations did employees waive any rights pursuant to the Labor Code and the Division's Order to Take Special Action bearing upon the employer's concommitant duty to provide and pay for the required safety equipment for enumerated employees.

ARGUMENT
I

THE DIVISION'S ORDER WHICH REQUIRED THAT SIMPSON PROVIDE AND PAY FOR SAFETY SHOES FOR SPECIFIED EMPLOYEES IS NOT PREEMPTED BY FEDERAL LAW

Simpson urges that this case presents a clear-cut issue of far reaching importance in that the Division's Order to Take Special Action directly conflicts with a specific provision of Simpson's collective bargaining agreement. What Simpson is in fact referring to is a nonexistent written provision in a collective bargaining agreement which at best harks back to a custom and practice which was never the subject of any collective bargaining session. Moreover, the custom and practice occurred at a time when safety shoes were not required equipment and only those employees who voluntarily chose on their own initiative to purchase them could qualify for Simpson's partial reimbursement policy. Rather than constituting a specific economic provision which was the subject of rigorous discussion during the course of collective bargaining concerning which employees were required to wear safety shoes and what amount of reimbursement would be appropriate under such circumstances, the so-called collective bargaining agreements at most point to a prior period of time in which partial reimbursement was allowed to employees who on their own volition chose to purchase such equipment. As will be seen in the forthcoming discussion, the Division's Order under such circumstances neither abridges nor is preempted by federal labor law.

The Court of Appeal in this case concluded that the custom and practice of partial reimbursement for *voluntary* use of safety shoes by employees became a part of the contract. (The Division

had argued that a custom and practice of partial reimbursement concerning the voluntary use of safety equipment did not constitute a waiver of the employer's duty to both provide and pay for such equipment when it was subsequently required by law. For these reasons, the Division maintained that the bargaining agreement did not encompass this issue.) However, the Court also pointed out that "prior to its [The Order's] issuance, there existed no specific mandatory duty on the part of the employer to provide particularly described equipment for the enumerated employees." (Decision of the Court of Appeal, at Appendix, p. A-11 of Writ)[4] Equally important, during the time the custom and practice existed for partial reimbursement of safety shoes, Simpson did not require employees to utilize such shoes as a condition of employment. (Brief of Simpson, July 2, 1981, filed with the Division) Under these facts, the Court concluded,

> Where, as here, there was no mutually recognized obligation of the employer to pay for the safety shoes for the enumerated employees before the order, it is untenable to urge that the employees bargained away that to which they had a statutory entitlement. (Decision of Court of Appeal, at Appendix, p. A-11 of Writ.)

For this reason, the Court of Appeal determined that it need not reach the issue concerning whether payment for required safety equipment could be shifted by the employer to the employee.

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[4] Simpson's argument that the issue in this case is purely one of economics, who shall purchase safety shoes, and that there is no dispute that shoes shoes should be worn, does not comport with its litigation posture before the Division. In its appeal of the Order to Take Special Action, Simpson challenged the need for any type of foot protection in two of the eleven designated areas. Moreover, with reference to five of the nine remaining areas where it acknowledged the need for foot protection, Simpson asserted that employees in these five categories would be adequately protected by wearing toe caps instead of the safety shoes specified in the Order. (Decision of Hearing Officer, pp. 12-13.) Given this background, Simpson's contention that the bargaining agreement addressed this issue is belied by the fact that from its own perspective it denied the need for foot protection in some areas of its mill and would have specified only a lower form of protection in others.

As stated earlier, California law generally requires that the employer both provide and pay for safety equipment. *Bendix Forest Products Corporation v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr. 882, 600 P.2d 1339], *Oakland Police Officers Association v. City of Oakland* (1973) 30 Cal.App.3d 96 [106 Cal.Rptr. 134], Labor Code 6401. Given this statutory background and case interpretation thereof, if an employer in California were to shift through collective bargaining the duty of payment for required safety devices to the employee, the Division maintains that any such bargaining sessions must begin with the employer acknowledging the concommitant duty to provide and pay for required safety devices. Absent such an acknowledgement on the employer's part, there could be no meaningful bargaining away or waiver of such a statutory entitlement. Neither a union nor an individual employee should be put in the position of imploring or begging the employer to fulfill its statutory duties and, failing to accomplish this objective, being deemed to waive the prerogative to benefit from statutory rights or entitlements. Clearly in this case, Simpson never at any collective bargaining session acknowledged that it had both the duty to provide and pay for required safety devices. Simpson engaged at best in providing an insignificant contribution toward the cost of safety shoes when employees chose to purchase them on their own volition. In a situation where the employer never acknowledged its duty to provide and pay for required safety equipment, the Division maintains that a collective bargaining agreement could not be the vehicle for waiving statutory rights.

Given this background, the Division maintains that the Order in this case does not impermissibly intrude upon the custom and practice which was deemed to be incorporated into the collective bargaining agreements. In fact, the Division's Order in this case, which required that Simpson provide safety shoes to employees in areas where they had not previously been required and in areas in which less protective safety equipment (steel toe caps) had been permitted, and which required that the employer pay for the safety equipment, falls within the type of state regulation of health, safety and welfare of workers which has long been recognized by this Court as not being abridged by federal labor law. *Terminal R. Association v. Brotherhood of R. Trainmen*

(1943) 318 U.S. 1, 6-7. In the *Terminal* case, *supra,* this Court upheld a state safety regulation which was challenged on the ground that it specifically conflicted with a provision in the collective bargaining agreement. This decision was relied upon by the California Supreme Court in resolving whether the California Industrial Welfare Commission could issue orders to employers to establish minimum wages, maximum hours, or standard conditions of employment to protect health and safety of workers. *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 69 [166 Cal.Rptr. 331, 613 P.2d 579] In this case, the California Hotel and Motel Association argued that because the aforementioned matters were subject to collective bargaining, this state lacked power to establish minimum standards for the protection of workers. The California Supreme Court phrased this argument in the following manner:

> Taken at face value, the employer's contentions in this regard would have the effect of precluding the IWC from regulating with respect to *any* of the matters within its jurisdiction. Under each of the labor statutes which apply to the industries regulated by the Commission—the National Labor Relations Act (NLRA) 29 U.S.C. section 151, *et seq.,* The Railway Labor Act (NLRA) 45 U.S.C. section 151, *et seq.,* the Agricultural Labor Relations Act (ALRA) section [Labor Code] 1140, *et seq.)*—"wages, hours and working conditions" constitute mandatory subjects of collective bargaining. Thus, if these labor statutes in fact prohibited all governmental regulation on any matter that is subject to employee-employer bargaining, neither the IWC, nor any other state or federal agency would have authority to prescribe minimum wages or maximum hours, to promulgate occupational safety and health standards, or to prohibit discriminatory employment practices. The mere recitation of the logical consequences of the employers' argument, of course, signals the extreme tenuousness of the employers' contention. *Industrial Welfare Commission, supra,* 27 Cal.3d 725-726 [166 Cal.Rptr. at 351-352].

Citing this Court's decision in the *Terminal* case, *supra,* the California Supreme Court went on to conclude

> the fact that these matters may also constitute proper, indeed "mandatory," subjects of collective bargaining does not preclude the state from adopting minimum standards to protect the welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at the bargaining table. *Industrial Welfare Commission, supra,* 27 Cal.3d at 728 [166 Cal.Rptr. at 353].

In *Metropolitan Life Insurance Company v. Massachusetts* (1985) 471 U.S. ____ [105 S.Ct. 2380, 85 L.Ed.2d 728] [hereinafter *Metropolitan*] this Court articulated two distinct NLRA preemption principles:

> The so-called *Garmon* rule (citation omitted) protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA.
>
> A second preemption doctrine protects against state interference with policies implicated by the structure of the Act itself by preempting state law and state causes of action concerning conduct that Congress intended to be unregulated.
>
> *Metropolitan, supra,* 105 S.Ct. at 2394.

Simpson appears to argue that this latter doctrine of preemption bars the Division's Order in this case. However, in *Metropolitan, supra,* this Court held that nothing in the legislative history of the National Labor Relations Act, 29 U.S.C. 151, *et seq.,* (hereinafter NLRA), suggests that federal law must preempt any state attempt to impose minimum labor standards on parties to a collective bargaining agreement. In *Metropolitan,* this Court distinguished prior decisions concerning types of conduct that a state cannot impinge upon, which constituted courses of conduct that Congress intended to be unregulated. *Teamsters v. Morton* (1964) 377 U.S. 252, (in which an Ohio law that prohibited secondary boycotts was preempted because such conduct was neither prohibited nor protected under the NLRA), *Machinists v. Wisconsin Employment Relations Commission* (1976) 427 U.S. 132, (in which state attempts to penalize a concerted refusal to work overtime were declared impermissible given Congressional intent that such conduct be unregulated). However, in *Metropoli-*

tan, supra, this Court rejected insurers' challenges to a Massachusetts law which were premised on a theory that because Massachusetts specified minimum mental health care benefits for employee health care plans, such action constituted an impermissible intrusion upon the collective bargaining process. In essence, the insurers were arguing that federal labor law prevented states from establishing minimum employment standards that would otherwise be subject to collective bargaining between management and labor. Thus, because Congress' ultimate concern was to leave parties free to reach agreement about specific contract terms, the insurers argued that any law that interfered with the end result of bargaining was *per se* forbidden. In rejecting this argument, this Court held

> No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimum substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
>
> Accordingly, it has never been argued successfully that minimum labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. (Citations omitted) Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimum employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.
>
> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect upon the right of self organization established in the Act . . . . Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to processes of

> bargaining or self organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. The States traditionally have had great latitude under their police powers to legislate " 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " (Citations omitted) "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety are only a few examples." (Citation omitted) *Metropolitan, supra,* 105 S.Ct. at 2397-2398.

California law provides generally that employers must provide and pay for safety equipment. Labor Code 6401, *Bendix Forest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr. 882, 600 P.2d 1339]. In this case, the Division implemented this law by issuing an Order to Simpson which required that it provide and pay for safety shoes in numerous areas of its Shasta Mill where previously no foot protection was utilized or a less satisfactory form of protection was deemed acceptable. Simpson's only defense to the Order is that there previously existed a custom and practice of providing partial reimbursement to employees who voluntarily chose to purchase safety shoes which were neither required by Simpson nor by the law. The Division submits that under the facts of this case the Order does not impermissibly impact the collective bargaining process and constitutes permissible state regulation within this Court's decision in *Metropolitan, supra.*

II

THE COURT OF APPEAL PROPERLY DETERMINED THAT DEFERRAL TO THE LABOR ARBITRATOR'S DECISION WAS NOT REQUIRED UNDER THE FACTS OF THIS CASE

In light of the decision by this Court in *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 737, Simpson's argu-

ment that the Division was required to defer to the arbitrator's decision is without merit. In that case, this Court held that employees could bring an action in federal District Court alleging violation of minimum wage provisions of the Fair Labor Standards Act even though a wage claim based on the same underlying facts was submitted to a joint grievance committee pursuant to the collective bargaining agreement and was unsuccessful. In reversing the Court of Appeals decision which held that the District Court was correct in not addressing the merits of the claim in light of the earlier grievance, this Court held

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers. *Barrentine, supra,* 450 U.S. 737

While arbitrators' decisions can be admitted into evidence, there are no existing standards which govern the weight to be afforded such a decision. In *Alexander v. Gardner Denver Company* (1974) 415 U.S. 36, this Court held that such determinations

> were discretionary with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with the [statute], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's [statutory] rights, a court may properly accord it great weight. *Alexander, supra,* 415 U.S. at 60, fn. 21.

Applying these criteria to the decision issued by the arbitrator in this case, there is no basis for such deferral. The only issue before the arbitrator was whether the employer had a contractual duty to pay for the entire price of the safety shoes. The arbitrator

concluded that "there is nothing in the agreement which gives the arbitrator the authority to insert that condition in the collective bargaining agreement." (Brief of Simpson, July 2, 1981, Exhibit G, p. 7). This holding is consistent with the decision of the hearing officer, who also concluded that the employer had no contractual obligation to pay for the shoes. (Decision of Hearing Officer, p. 33) There is no conflict between the arbitrator and the hearing officer concerning the interpretation of the language of the contract. However, the arbitrator, in dicta, concluded that the employer had no duty to pay for the full price of the shoes because the past custom and practice of providing a $4.00 reimbursement for employees who voluntarily chose to purchase safety shoes became part of the contract. As the hearing officer correctly found, the arbitrator's decision did not give serious consideration to the employee's statutory rights or the public policy underlying the enactment of the California Occupational Safety and Health Act, Labor Code 6300, *et seq.* and for these reasons should not act as a bar to the Division's Order.

The basic policy underlying the California Occupational Safety and Health Act is reflected in the fact that "The primary responsibility for safety has been placed on the employer." *Bendix Forest Products Corporation v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465, 470-471 [158 Cal.Rptr. 882, 885, 600 P.2d 1339] Labor Code section 6400 states that "Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein."

As previously discussed (at pp. 9-10), California law generally requires that the employer both provide and pay for safety equipment. *Bendix, supra, Oakland Police Officers Association v. City of Oakland* (1973) 30 Cal.App.3d 96 [106 Cal.Rptr. 134], Labor Code 6401. Thus, California employees are beneficiaries of a general statutory entitlement for provision and payment for required safety equipment.

Given this background, the labor arbitrator's determination, that the custom and practice of providing partial reimbursement for those employees who voluntarily chose to wear safety shoes became part of the contract, could not possibly be deemed a binding decision construing statutory rights when safety shoes

became mandatory equipment as a matter of law. The hearing officer properly determined that there was no waiver by employees of their statutory right to provision and payment for such safety equipment based upon the past practice of partial reimbursement when such safety shoes were neither required by Simpson nor by the law.

III

THE COURT OF APPEAL DECISION IN THIS CASE DOES NOT UNDULY BURDEN COLLECTIVE BARGAINING

Simpson points to developments just prior to submission of the case to the Court of Appeal (which were never formally presented to the Court by Simpson) and to events subsequent to submission of the case to premise its argument that the Court's decision fails to take cognizance of events which it did not know about. Such criticism seems hardly warranted. Moreover, Simpson's argument that, as a result of negotiations in 1982 and 1985, in which the amount of partial reimbursement was continued and then increased respectively, the Union sought to bargain away its rights under the Labor Code and the Division's Order is refuted by the declaration of the Union President, Richard James. He stated that by entering negotiations to attempt to assure interim relief during the pendency of the litigation, the Union was in no way waiving any rights that it obtained pursuant to the Division's Order to Take Special Action for complete reimbursement for required safety shoes. (Declaration of Richard James, pp. 1-2)

The argument that the Court of Appeal decision could place in question collective bargaining agreements is sheer speculation.

It should be noted that this is not a case involving a Division Order issued to an employer who in good faith entered into collective bargaining agreements with the Union, began the negotiating process by acknowledging its duty to provide and pay for safety equipment, offered a distinct economic benefit in lieu of fulfilling this statutory obligation, and memorialized this agreement in writing. To date, no Division Order has been issued with reference to such a collective bargaining process. Rather, this case

at best involves a custom and practice of providing partial reimbursement for employees who voluntarily chose to purchase safety shoes when they were neither required by Simpson nor the law, in which there was no discussion of the custom and practice at any bargaining session prior to issuance of the Division's Order, and in which the written collective bargaining agreement neither referenced provision and payment for safety equipment in general nor safety shoes in particular. Given the facts in this case, the Court of Appeal decision upholding the Division Order cannot be said to have unduly burdened collective bargaining negotiations prior to issuance of the Division's Order.

IV

THE COURT OF APPEAL DECISION IS CONSISTENT WITH THE FEDERAL-STATE RELATIONSHIP ENVISAGED BY THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Simpson's reliance on the decision in *Budd Company v. Occupational Safety and Health Review Commission,* 513 F.2d 201 (3d. Cir. 1975) for the proposition, that because federal occupational safety and health law does not genefally require the employer to pay for required safety equipment, the Court of Appeal decision is contrary to, and therefore in conflicIt with, federal law, is misplaced. In *Budd, supra,* the Union, not the agency, sought to compel the employer to pay for protective equipment. The secretary did not advance a claim that the employer had an obligation to pay. The Review Commission affirmed the Secretary's position. The only question on appeal was whether the Commission's decision was arbitrary, capricious, or an abuse of discretion. *Id.* at 204. In upholding the decision of the Commission, the Third Circuit stated its duty to accord "great deference" to the agency's construction of the language in question. See also *Concrete Construction Company v. Occupational Safety and Health Review Commission,* 598 F.2d 1031 (6th Cir. 1979). According the same deference to Cal/OSHA's interpretation would lead to an affirmation of the Division's Order in this case. *Udall v. Tallman* (1965) 380 U.S. 1, 16, *Davey Tree Surgery Company v. Occupational Safety and Health Appeals*

Board (1985) 167 Cal.App.3d 1232, 1243 [213 Cal.Rptr. 806, 812].

More importantly, the federal-state relationship envisaged by section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 667, clearly permits states to provide a more protective program than the federal counterpart. *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board* (1982) 32 Cal.3d 762, 771-772 [187 Cal.Rptr. 387, 393-394, 654 P.2d 157]. When California submitted a State Plan to the Secretary of Labor, which was approved in 1972, and adopted the California Occupational Safety and Health Act in 1973, the only requirement was that the coverage of the Cal/OSHA Program be at least as effective in providing safety and health protection as would be accorded under the federal Act. Moreover, Labor Code section 6401, which has been interpreted by the Division and California courts to require generally that employers both provide and pay for safety equipment, was in existence in substantially similar form since 1913. (Stats. 1913, Ch. 176, section 52, p. 306—The only change as a result of the 1973 Cal/OSHA Act from the prior statute which had been in effect since 1937 was the addition of the words "healthful" and "health" to this Labor Code provision. Stats. 1937, Ch. 90, p. 308.) Prior to, and after passage of the California Occupational Safety and Health Act, courts affirmed the Division's interpretation that this section required payment as well as provision of required safety devices. *Bendix Forest Products Corporation v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr. 882, 600 P.2d 1339], *Oakland Police Officer's Association v. City of Oakland* (1973) 30 Cal.App.3d 96 [106 Cal.Rptr. 134]. Thus the California Act merely carried forward longstanding statutory and judicial expressions concerning this subject matter.

In a previous case before this Court involving the Cal/OSHA Program, *United Air Lines, Inc. v. The Division of Industrial Safety,* No. 80-1594, this Court invited the Solicitor General to file a brief expressing the views of the United States concerning a similar issue raised on a Petition for Writ of Certiorari by United Air Lines. In response to the question concerning whether the federal Act limited a state's ability to provide more expansive

jurisdiction and protection to its employees, the Solicitor General stated

> States that have adopted federally approved plans are free to conduct regulatory programs relating to occupational safety and health, subject to the maintenance of a federal enforcement presence during the initial phases of such plans. However, section 18 does not confer federal power on the states; the section merely removes federal preemption so that the states may exercise their sovereign powers over occupational safety and health. (Citations omitted)
>
> Thus, the limitations imposed on OSHA by Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), are not imported into state law, as is evident from the language of the OSH Act. Under section 18 of the OSH Act, 29 U.S.C. 667, states with approved plans are not prohibited from maintaining coverage that is more extensive or standards that are more stringent than those developed by OSHA. Amicus Brief of the Solicitor General, pp. 5-6.

In conclusion, California statutory and case law which require that employers generally both provide and pay for safety equipment is in conformance with the federal-state relationship envisaged by section 18 of the Federal Act, 29 U.S.C. 667.

V

THE ISSUES PRESENTED IN THIS LITIGATION ARE SUBSTANTIALLY DIFFERENT THAN THOSE RAISED IN THE FORT HALIFAX PACKING COMPANY DECISION

In a supplemental brief in support of its petition, Simpson argues that issues raised in an appeal of the recent decision by the Supreme Judicial Court of Maine in *Director of Bureau of Labor Standards, et al. v. Fort Halifax Packing* (1986) 510 A.2d 1054, in which this Court has noted probable jurisdiction, bear substantial resemblance to the instant case. However, a review of the facts underscoring the legal issues does not support this conten-

tion.[5] With reference to its argument that the Maine severance pay statute, 26 M.R.S.A. 625-B, is preempted by the National Labor Relations Act, 29 U.S.C. 141, *et seq.*, Appellant Fort Halifax is arguing that the Maine statutory scheme is unconstitutional. Not once at any time in the administrative or judicial proceedings pertaining to this case did Simpson ever argue that the California statutory provision which provides that an employer must generally provide and pay for required safety equipment, Labor Code 6401, *Bendix Forest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr 882, 600 P.2d 1339] is *per se* an unconstitutional abridgement of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, To the contrary, Simpson has cited as authority the California Supreme Court decision in *Bendix, supra,* for the proposition that "there can be an agreement between an employer and union as to who specifically shall have to pay for safety shoes." Simpson's Petition, p 16. The entire thrust of Simpson's argument with reference to the preemption issue has been that the Division's Order impermissibly interfered with its collective bargaining agreement. As we have previously stated, the so-called collective bargaining agreement referred to a custom and practice which had become incorporated by reference in which Simpson paid partial reimbursement to employees who voluntarily chose to purchase safety shoes when the shoes were neither required by Simpson nor by the law. By referencing the *Fort Halifax* decision, *supra,* in which the state statutory scheme is being challenged as unconstitutional, Simpson raises issues which are vastly different than any which have been previously argued. At this late stage of litigation, Simpson should not be granted leave to reference issues which have been neither raised nor considered previously.

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[5] In the *Fort Halifax* case, *supra* two preemption issues were presented for review by this Court: whether the Maine severance pay provisions were preempted (1) by the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*, or (2) by the National Labor Relations Act, 29 U.S.C. 151, *et seq.* In the notation of probable jurisdiction it is unclear whether the former issue, the latter issue, or both issues are under possible consideration.

Moreover, the Maine statutory scheme which provided a formula for payment of severance pay is of substantially different dimensions than the California statutory provision, which has been in existence for seven decades, which has been interpreted both by the Division and courts to require that employers provide and pay for required safety equipment. There can be little question in light of this Court's prior decision in *Terminal R. Association v. Brotherhood of R. Trainmen* (1943) 318 U.S. 1, 6-7, that a state, in the context of its regulation of occupational safety and health, can make the determination that as a general rule employers must both provide and pay for required safety equipment. The legislative determination that the provision of a safe and healthful place of employment can best be secured by this minimum standard constitutes a valid exercise of the state's police power. Because the facts and legal issues raised in the *Fort Halifax* case are substantially different than the instant case, the Division believes that this Court's action with reference to the former has no bearing with reference to the latter.

CONCLUSION

For the reasons stated, Respondent Division of Occupational Safety and Health respectfully prays that the Petition for Writ of Certiorari to review the decision of the California Court of Appeal not be granted.

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